Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 42 | Issue 2 Article 5

Winter 1967

Shared Time Strategy, by Anna Fay Friedlander

Robert F. Drinan, S.J.
Boston College of Law

BOOK REVIEWS

THE SHARED TIME STRATEGY. By Anna Fay Friedlander. St. Louis, Mo.: Concordia Publishing House. 1966. Pp. ix, 87. $3.25.

In the midst of the highly emotional national controversy in 1961 regarding the constitutionality of federal aid to church-related schools Dr. Harry L. Stearns, a relatively unknown public school educator in New Jersey, published an article in a national magazine entitled "Shared-Time: Answer to an Impasse?"[1] Hardly anyone at that time would have predicted that in 1965 his idea would become embodied into law in the nation's first federal aid to education bill for schools of less than collegiate rank.

The idea of shared time is simple, but its implications are enormous. Shared time (or dual enrollment as it has come to be known) starts with the assumption that since *all* children have a right to attend a school on a *full*-time basis, they also possess a right to attend these schools as *part*-time students. It follows therefore that children who are enrolled in private church-related schools may, if they so desire, attend the appropriate public school for instruction in those academic subjects which are not value-laden.

When the Johnson administration in 1964 and 1965 was desperately searching for *some* formula by which federal aid could be made acceptable to Catholics, Protestants, and Jews, the concept of shared time received at least the acquiescence of these groups. It could be argued that all three groups should have repudiated the idea if they intended to be faithful to their previous positions with respect to federal aid and sectarian schools. In any event, shared time became a significant part of Title I of the 1965 Elementary and Secondary Education Act.[2]

It is to this concept that Mrs. Anna Fay Friedlander, a Dallas journalist and wife of a lawyer, has directed her attention in this slim but significant volume. Shared time, as of the time of the publication of this book, was operative in 251 elementary and in 182 high schools. Programs involving shared time have probably increased in number and extent since the publication of this book, but it appears to become more uncertain every day whether shared time is the answer to the parents' request for governmental assistance for the secular aspects of church-

1. Christianity and Crisis, Sept. 18, 1961.
2. 20 U.S.C. §§ 241a-44 (Supp. I, 1965).

related schools attended by their children.

The conditions which seemingly militate against the success of shared time are reported by Mrs. Friedlander who, as she reveals, is a sympathetic observer with an interest in sending her children to a Protestant day school. Perhaps the most serious adverse factor is the obvious phenomenon that there is virtually no room in public schools for part-time students. Moreover, the administrators of the public schools are, according to every poll, overwhelmingly opposed or at least unsympathetic to shared time. Furthermore, most of the parents of the prospective part-time students are not enthusiastic about their children acquiring a part of their education in a school where they are practically strangers.

Aside from these formidable barriers shared time, in the judgment of some legal scholars, poses constitutional difficulties. No consensus exists on this question, but in January, 1967, a significant number of the forty church-state lawsuits pending in state and federal courts raised constitutional issues about shared time and its companion "shared services"—a program (also authorized by the act) under which students in non-public schools may receive compensatory educational courses such as remedial reading.[3]

Mrs. Friedlander has appended to her study a notation of the few rulings of state attorneys general with respect to shared time, as well as a description of experiments in dual enrollment in eight states. On the basic issue involved, however, Mrs. Friedlander is somewhat less than analytical; she calls shared time a "compromise" but states that in "a democracy we are committed to such compromises as Shared Time as a way of working out problems."[4] It is never clearly stated why shared time is a compromise or whether it would cease to be a compromise if it turned out to be what the author calls a "solution."[5]

No one, however, could expect this preliminary study of shared time to raise, much less answer, the hard questions about the purposes, the philosophy, and the future of the nation's first federal law granting massive assistance to elementary and secondary schools. But some of the assumptions of the 1965 Elementary and Secondary Education Act raise issues which clearly deserve and, indeed, demand an answer. The act assumes (1) that the teaching of certain secular subjects in the public schools is done in a way that is contrary to the basic viewpoints of certain religious groups, and (2) that instruction in these subjects in a way not

3. 20 U.S.C. § 241e (Supp. I, 1965).
4. P. 64.
5. P. 66.

consistent with the religious convictions of students who attend church-related schools *may* constitutionally be given in a public school with public funds, but private denominational schools may not have a proportionate share of public funds to teach these same secular subjects in a way consistent with their own interpretation of secular reality.

Let us explore the implications of these two assumptions. For countless individuals in America the persistently nagging question concerning state support for church-related schools has been: why cannot *all* children go to the public school since this school in all its teachings is neutral with regard to religion? If one agrees with this assumption of the public school's neutrality, the creation of private sectarian schools is clearly attributable exclusively to the desire of some parents to mingle religion with their children's training in secular subjects. It follows therefore that these schools have no claim on public funds since they, with no mandate from the state, merely duplicate the work of the public school.

The 1965 Elementary and Secondary Education Act appears to have rejected this uncomplicated view of the question of state aid for church-related schools. The act concedes that the public school has a viewpoint, an orientation or a philosophy of the meaning of secular reality, which, at certain points, is at variance with the viewpoint of some religious groups with regard to the meaning of the same secular reality. Therefore, the act assumes the existence of a plurality in American education which calls for the creation of a wholly new juridical entity—the child who is a parttime student in a public school but who, for reasons of conscience, is enrolled only in those courses in the public school where the instruction will not contradict his interpretation of the meaning of the secular order. This concession or admission made by the act can only be classified as radical and even revolutionary. For the first time in American history federal legislation has conceded that the public school's version of secular history or non-sacred learning is not or cannot be so neutral that it can pose no contradictions or crises of conscience for certain religious persons or sectarian groups.

One may, to be sure, argue that the 1965 Elementary and Secondary Education Act is merely the extension of the doctrine of *Pierce v. Society of Sisters*.[6] If children cannot be compelled to attend the public school full-time, it would seem to follow that they cannot be prevented from attending both the private and the public school on a part-time basis. But the act goes beyond *Pierce* in that it endorses the concept that the public school should facilitate and even encourage attendance at a private,

6. 268 U.S. 510 (1925).

church-related school by assisting and, to a limited degree, requiring public schools to enroll some students on a part-time basis.

If it is argued that the drafters of the act did not intend to incorporate an implication of "encouragement" of private schools in their legislation, the simple fact is that the mere recognition of the existence of private schools in federal legislation is to some extent an "encouragement" of such schools. Indeed this "encouragement" began with the *Pierce* decision when the Supreme Court ruled that the interpretation of secular reality and non-sacred learning transmitted in private, church-related schools *must* be recognized by the states as a satisfactory substitute for the interpretation transmitted in a public school. The thrust of the logic of *Pierce* may in fact lead to the conclusion that a school which a state must constitutionally accept for the purpose of the state's compulsory attendance law cannot be precluded from those public funds appropriated for the purpose of implementing the law requiring the education of all youth under a certain age.

Even if, however, one disputes these suggested corollaries of *Pierce* and of the act, it seems clear that the 1965 federal aid to education law at least presumes that there is an identifiable content and orientation in the type of learning which the state transmits in the public school. The identification of this content and orientation is not made by the state, but rather by those who find them objectionable to their religious or spiritual point of view. The act, however, does not take the next logical step and establish a policy that the public school cannot in justice teach a particular orthodoxy in certain value-laden subjects when such a practice compels a significant group of the nation's parents to withdraw their children from instruction in those subjects in the public schools and to finance private schools so that their children may comply with the truancy laws. The failure of the act to confront this issue leads us to the second complex admission or omission made by it—its easy acceptance of the presence of value-laden subjects in the public school but its exclusion of the possibility of financing education in non-public schools in these secular subjects by parents who dissent from the values concededly present in public school instruction.

One of the few relatively clear policies of the act is the centrality which it gives to the public school. Virtually all instruction authorized by the bill *must* take place on the premises of the public school. The values which the public school intermingles with secular subjects are presumed to be "neutral," while the values of those groups who dissent from the public school's values are presumptively sectarian and therefore not constitutionally capable of being publicly supported. Moreover, the act

makes the public school central because shared time and shared services are under the exclusive domination of public school officials.

The act, in a strange paradox, is the first federal law to recognize and even "encourage" private schools, but it is also a bill which confers unprecedented centrality and prestige on the public school. By combining basically irreconcilable policies into the same law the act, enacted amid a national mood of religious ecumenicity and a spirit of "let-us-reason-together" political compromise, obscures more than it clarifies and impedes more than it implements. But for all its obscurity the Elementary and Secondary Education Act of 1965 may have forced the Great Society to concede the simple but hitherto rejected principle that Americans may no longer perpetuate the fantasy that those who opt out of the public school, in whole or in part, for reasons of conscience, may be treated by the nation's legal institutions as if they did not exist.

ROBERT F. DRINAN, S.J.†